GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
WASHINGTON, D.C. 20301

Honorable Roy L. Ash, Director
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Ash:

This is in response to your request for the views of the Department of Defense with respect to legislation proposed by the Central Intelligence Agency, "To amend the National Security Act of 1947, as amended."

The purpose of the proposed draft bill is to protect "information relating to intelligence sources and methods" whose dissemination has been restricted by the Director of Central Intelligence, by making it a criminal offense to "knowingly communicate such information to a person not authorized to receive it." The proposed legislation would amend section 102 of the National Security Act of 1947, as amended (50 U.S.C. 403), by adding a new subsection (g) which would make punishable the unauthorized disclosure of information relating to intelligence sources and methods by persons being in authorized possession of such information. The draft bill also contains authority to ask the courts for an injunction against any person who has engaged or is about to engage in any violations of the proposed subsection.

The Department of Defense is in accord with the intent of the proposed legislation. The Department of Defense supports those provisions prohibiting prosecution of or injunctions against non-Government employees (subsection (g)(3)); creating a defense for persons who furnish the information upon demand to the Congress (subsection (g)(4)); and allowing review by the court of the reasonableness of the classification, in camera if necessary (subsection (g)(5)).

There is some confusion with regard to the meaning of the language in proposed subsection (g)(2). That clause defines information relating to sources as "methods or techniques concerning foreign intelligence . . ." (emphasis added). It is unclear whether the intent is to protect methods used by the United States or information regarding methods used by foreign countries, or both. Perhaps the language could be clarified to clear up this point.

The standard for the court to use in judging the reasonableness of the classification, as established by subsection (g)(5), is "arbitrary and capricious." While we agree that this is a standard frequently used by the courts in determining the reasonableness of administrative actions by the Government, it is a concept sometimes difficult to apply to given factual situations. Accordingly, we suggest an alternate standard for consideration. A simple and direct standard, easy to apply and prove, would be to allow the court to find the classification unreasonable whenever the plaintiffs can establish that the information was not classified in accordance with the Government's own regulations on classifying information. This standard has the advantage of avoiding the uncertainties of the concept of "arbitrary and capricious."

Subsection (g)(6) establishes authority for the Attorney General to apply for injunctive relief to prevent the commission of the offense created by subsection (g). No standard is established in that clause to require that an immediate threat to the national security must exist before the injunction can be granted. In light of the Supreme Court decision in the case of New York Times v. U.S., 403 U.S. 713 (1971), a standard along those lines might be advisable. While the proposed injunction authority would apply only to persons having a privity of relationship to the Government and would not apply to the press, the courts could decide to apply a similar standard to Government employees as well. That case would be particularly relevant if a former Government employee were about to publish classified information relating to intelligence sources and methods. While the concurring justices in the New York Times case did not agree on a standard to be used, Justice Stewart suggested a standard of "direct, immediate, and irreparable damage to our nation," and Justice Marshall suggested it would be permissible in some cases to grant an injunction to prevent publication of material damaging to the "national security." Insertion of a similar standard into the proposed subsection (g)(6) might prevent a later finding of unconstitutionality by the courts.

The Department of Defense supports the enactment of the subject legislation proposed by the Central Intelligence Agency.

Sincerely,

L. Niederlehner
Acting General Counsel

ROUTING AND RECORD SHEET

OLC 74-0311

SUBJECT: (Optional)
Navy Comments on Proposed Legislation "To Amend National Security Act of 1947"

FROM:
STATINTL

EXTENSION | NO.

DATE

TO: (Officer designation, room number, and building)	DATE RECEIVED	DATE FORWARDED	OFFICER'S INITIALS	COMMENTS (Number each comment to show from whom to whom. Draw a line across column after each comment.)
1. STATINTL				6 to 1:
2. OGC				He Navy Member of the Security Committee, USIB dropped off the Navy comments (undated) on the DOD suggested changes to the Legislation (5 Feb 1974) at the end of the last Security Committee meeting.
3.				Sid Stembridge has indicated that, as far as he knows the proposed legislation was not sent through OS.
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6. STATINTL				
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Baseball Tel No, if you need it, is (9) 325-0198. He is the Navy SECOM Member.